IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.

R.S.A. No.3722 of 1997
Date of decision: 1.09.2006

Ram Avtar.

..... Appellant

Versus

Sanjay Kumar and others.

..... Respondents

CORAM : Hon'ble Mr.Justice Mahesh Grover

...

Present: Shri M.L.Sarin, Senior Advocate with Shri Jaspal Singh, Advocate for the appellant.

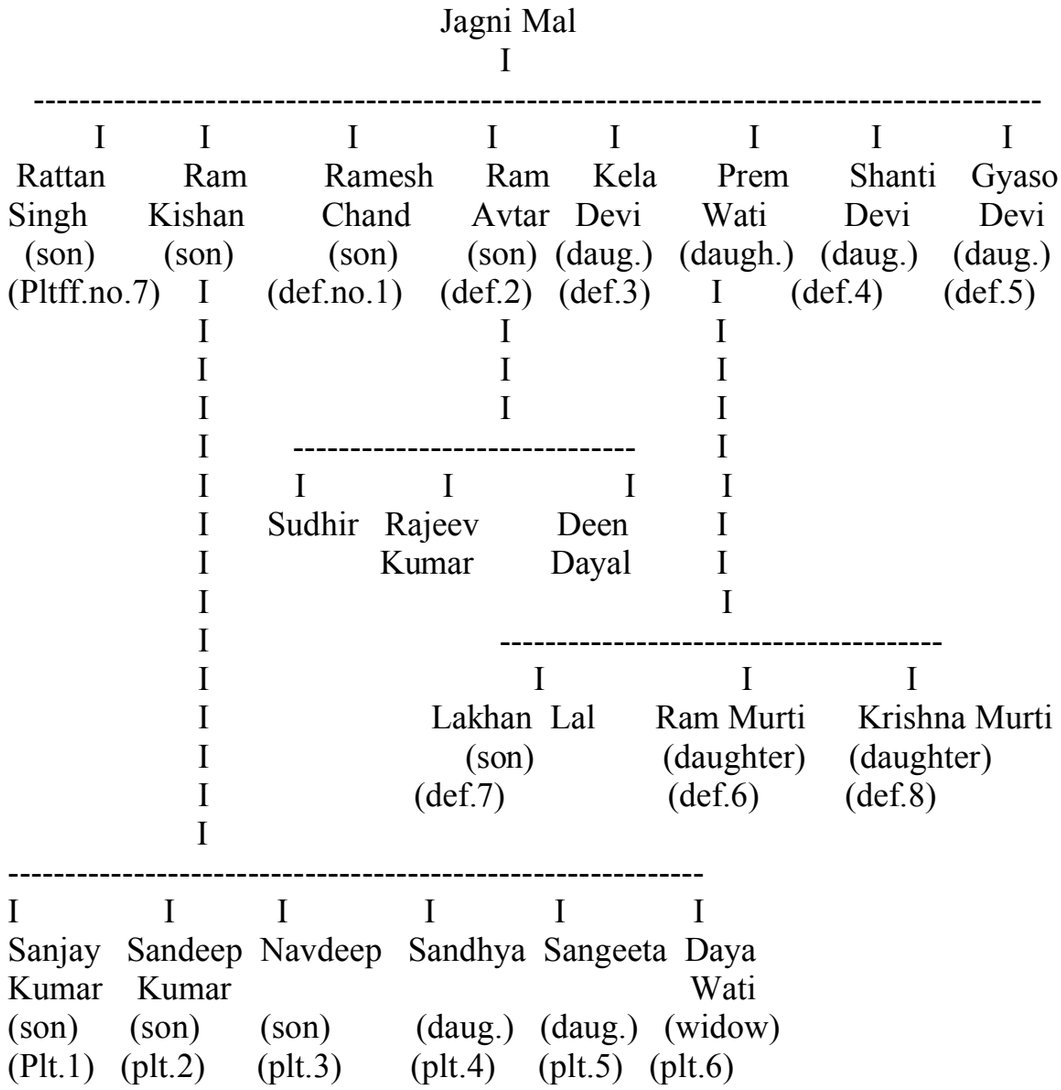
Shri Lokesh Sinhal, Advocate for respondent nos. 1 to 7.
None for other respondents.

...

Mahesh Grover,J.

Ram Avtar, who was one of the eight defendants in the suit filed by Sanjay Kumar and six others (the plaintiffs, now respondent nos. 1 to 7) for possession by way of partition, has filed this appeal assailing the judgment and decree dated 4.9.1997 passed by Additional District Judge, Faridabad (hereinafter described as `the lower Appellate Court'). Rest of the defendants have been arrayed as proforma respondents.

By way of the suit, partition was sought qua the property of Jagni Mal, the predecessor-in-interest of the parties. The pedigree table reflecting their inter se relationship is reproduced below:-



Jagni Mal had three sets of properties which are as under:-

(a) One pair of shops (two shops) situated at Main Bazar, Gad Darwaja, Ballabgarh, District Faridabad which are shown by letters `ABCDEF' in the site plan attached with the plaint and bounded as below:-

East : Shop of Dal Chand Murari Lal

West: Shop of Arya Samaj, Ballabgarh

North: Bazar and thoroughfare.

South: Gali Ab-chak and passage.

(b) A damaged house in the shape of plot which was under

mortgage with Bishamber Dayal son of Nanak Chand which is situated in Ballabgarh City, District Faridabad and bounded as below:-

East: Shop of Dr.Chander Sain

West: Gali Thoroughfare.

North: Property of Dr.Chander Sain

South: Gali and Passage.

© A house situated in Mohalla Baniawara, Ballabgarh City, District Faridabad, which is shown with letters `PQRS' in the site plan attached with the plaint and bounded as below:-

East: Mandir and House of Pt.Hari Chand.

West: Thoroughfare (Gali).

North: House of Sh.Devi Charan, Bidhu,Jiwan.

South: House of Lal Nang Ram son of Munji Lal.

During the life time of Jagni Mal, appellant-Ram Avtar filed civil suit no.919 of 13.12.1962 for partition of Joint Hindu Family property in question. In the said suit, the parties had appointed one Goverdhan Dass son of Puran Mal as the sole referee/ Salish to decide the controversy. An award was given by him on 18.5.1963 which was duly accepted by all the parties. On 23.5.1963, Sub Judge Ist Class, Palwal decreed the suit in terms of the said award and the decree was directed to be prepared on the stamp papers of Rs.130.50 ps. However, the decree could not be drawn up as the stamp papers were not filed by the parties.

According to that award, out of two shops as detailed in para

(a) above, one shop i.e. Western shop and the dilapidated house detailed in para (b) which was mortgaged with Bishamber Dayal, were given to Rattan Singh, (defendant no.7, now respondent no.7). Half portion of the eastern shop and some portion of the house detailed in para © were given to Ram Kishan, (father of present respondent nos. 1 to 5 and husband of respondent no.6). Southern portion of the property detailed in para © was given to Ramesh Chand (arrayed as respondent no.1 in the present appeal). Half portion of the eastern shop detailed in para (a) and a portion of the house in detailed in para © were given to Ram Avtar (now appellant). The properties detailed in paras (a), (b) and © above were to be owned and possessed by Jagni Mal during his life time and the award was to be given effect to after his death in the aforesaid manner.

Jagni Mal sold the house as described in para (b) to Chander Sain for a sale consideration of Rs.10,500/- vide sale deed dated 5.8.1977. The western shop was under mortgage with Jagni Mal about which two civil suits were filed which were decided on 29.9.1976. The appeals against the judgments in those suits were filed by Devi Dayal and Mam Chand which were decided on 6.3.1979 and the suits for redemption were decreed. Neither Devi Dayal nor Mam Chand filed any application for preparation of final decree nor any execution was filed and it was stated that the redemption decrees had become null & void and ineffective qua the rights of the parties and the property continued to be joint.

Jagni Mal died on 1.1.1980 and it was averred that even after his death, award dated 18.5.1963 was not implemented and, therefore, the plaintiffs had become entitled to get the aforesaid properties partitioned as per the said award and in the alternative, they were entitled to seek fresh

partition by meets and bounds of the properties as fully detailed in paras (a) to © in which their share is 1/4th, while that of plaintiff no.7, defendant no.1 and defendant no.4 had 1/4th share each. The sole prayer made in the suit was that the properties should be ordered to be partitioned in accordance with award dated 18.5.1963 by fresh partition by meets and bounds.

Defendant no.1, Ramesh Chand, who is now respondent no.1, admitted the claim of the plaintiffs and prayed that the suit be decreed.

The suit was, however, resisted by Ram Avtar (now appellant), Smt.Shanti Devi daughter of Jagni Mal and Lakhan Lal son of Prem Wati daughter of Jagni Mal. The main objection taken to the suit was that it was not maintainable and was barred by the principle of res judicata and that the property cannot be partitioned again. It was pleaded that the earlier decree passed in suit no.919 of 13.12.1962 had become final and if, at all, there was any right, the plaintiffs could have gone up in execution of that decree. It was further pleaded that the mortgaged shop was got redeemed by the mortgagor, Devi Dayal, in terms of the judgment and decree dated 6.3.1979 on payment of Rs.2000/- to Jagni Mal-deceased and thereafter, the said shop was taken on rent from Devi Dayal by Ram Avtar, who sold the same to Satish Chand vide registered sale deed dated 17.3.1986 and thereafter, the same was given to Rajiv Kumar by Satish Chand in a family settlement which was confirmed in civil suit no.130 of 1990, decided on 17.3.1990. It was contended that Jagni Mal, being the sole owner of the suit shop, had willed away the same to Ram Avtar vide registered sale deed dated 27.8.1976 and after the death of Jagni Mal, Ram Avtar was occupying the suit shop exclusively, openly, uninterruptedly, continuously to the

knowledge of the plaintiffs and that no body had any right in the same. It was also contended that the sale proceeds of the house detailed in para (b) above were received by Rattan Singh and since some property had been sold and the suit shop had been willed away, there is no question of partition of the properties.

On the pleadings of the parties, as many as eight issues were framed on 6.8.1993, which were supplemented by additional issues framed on 8.10.1993 and 3.2.1995. The same read as under:-

1. Whether the suit property is joint and liable to be partitioned between the parties?OPP
2. Whether the plaintiffs have no cause of action to file the present suit?OPD
3. Whether the suit is not within time?OPD
4. Whether the plaintiffs have no locus standi to file the present suit?OPD
5. Whether the plaintiffs are estopped by their own acts and conduct from filing the present suit?OPD
6. Whether the suit is not maintainable in the present form?OPD
7. Whether the suit is false and frivolous and is liable to be dismissed u/s 35-A CPC?OPD

7-A. Whether Sh.Jagnimal executed a valid and lawful will in favour of defendant no.2 on 27.8.1976, if so to what effect?OPD

7-B. Whether the defendant no.2 acquired absolute ownership rights qua the suit shops stated in para No.2(a) of the plaint?OPD

7-C. Whether Devi Dayal got redeemed the suit shop from late Jagnimal as alleged, if so, to what effect?OPD

7-D. Whether this suit is barred by principle of res judicata?OPD

7-E. Whether suit is bad for non-joinder of necessary parties?OPD

8. Relief.

After perusing the entire evidence on record, the trial Court returned its findings on issues nos. 1, 3, 7-B, 7-C and 7-E in favour of the plaintiffs, while issue nos. 2, 4, 6, 5, 7,7-D were answered in favour of the defendants, while issue no.7-A was answered in favour of Ram Avtar (defendant no.2, now appellant.). The trial Court thereafter went on to dismiss the suit of the plaintiffs, who filed appeal before the lower Appellate Court. Ram Avtar, the present appellant, also filed cross objections. The appeal filed by the plaintiffs was allowed, while the cross objections of Ram Avtar were dismissed. The lower Appellate Court held as under:-

> "Thus, it is held that the share of plaintiffs No.1 to 6 jointly is 1/4th while Rattan Singh (plaintiff no.7), Ramesh Chand (defendant no.1) and Ram Avtar (defendant no.2) are having 1/4th share each in the suit property. Thus, the joint property is to be partitioned accordingly. It is directed that the learned Lower Court would pass a final decree of partition as and when any of the parties to the suit files an application for doing so,. However, the learned trial Court would give due regard to the Award dated 18.5.1963, the copy of which is Ex.P2, while passing the final decree of partition."

The present appeal has been filed Ram Avtar for setting aside the judgment and decree passed by the lower Appellate Court.

It was contended by Shri M.L.Sarin, Senior Advocate that the suit was barred by the principle of res judicata. In Civil Suit No.919 of 1962

a preliminary decree had already been passed and the final decree had been passed on 6.5.1996 and once a valid decree had been passed, no subsequent suit for partition would lie. He submitted that the only course open to the parties was to execute the aforesaid decree and in fact, an execution application has actually been filed by Ramesh Chand (respondent no.1) in which objections have been raised by the appellant which was his right and, therefore, the Executing Court has the jurisdiction to go into the matter and decide the objections, but under no circumstance, could a second suit be filed. It was further contended that in any case, after passing of the preliminary decree which was a final act, the status of the joint family had been severed and the subsequent suit for partition on this count also could not be maintained. He relied on the judgment of the Supreme Court reported as AIR 1997 S.C. 3767 – Anil Kumar Mitra and others Versus Ganendra Nath Mitra and others, which is to the effect that where a suit for partition had been filed earlier and the joint family status has been terminated and partition of the joint family property has taken place in the earlier suit, that even though the parties continue to be members of the joint family by their acts even after the partition, no subsequent claim for partition was maintainable as there was no proof of reunion of their respective shares in the family property.

To the same effect was the judgment reported as AIR 1970 S.C.1536 -Chandra Kant Misir and others Versus Balakrishna Misir and others, wherein it was held as under:-

> “1.that the dismissal of the previous suit for partition for failure to deposit the Commissioner's fee could not operate to wipe out the preliminary decree.

2.that the plaintiff could not contend that he was not served as a party in the previous suit. Since the plaintiff acted pursuant to the award it was reasonable to infer that a decree binding him would not be made unless he was duly served with the writ of summons from the court.

3. that the plaintiff having acted on the award it was not open to him to contend after 35 years that the arbitrator acted improperly in awarding a member a larger share than what was awardable to him unde the Hindu law relating to partition.

4. that, therefore, the second suit for partition was rightly dismissed by the High Court."

The next contention which was raised by the learned counsel for the appellant is that there was sufficient evidence on record to show that Jagni Mal and Rattan Singh were mortgagees in the respect of the shop (western shop) and a suit for redemption had been filed by Devi Dayal, while the other suit was filed by Mam Chand. The suit filed by Devi Dayal was dismissed, while that of Mam Chand was decreed. Devi Dayal and Rattan Singh had filed appeals. The appeal filed by Rattan Singh was dismissed implying thereby that the decree of possession by way of redemption in respect of 2/3rd share of Mam Chand had been affirmed and the appeal filed by Devi Dayal was accepted and he was granted 1/3rd share in the shop on deposit of Rs.666.67 ps. This amount was deposited on 27.4.1979, but no amount was deposited by Mam Chand. According to the learned counsel for the appellants, there was sufficient evidence to show that this share had been redeemed by Devi Dayal on payment of Rs.2000/- to Jagni Mal and the lower Appellate Court has gone wrong in not believing

the cogent evidence to this effect.

Attention was also drawn to the specific finding given by the lower Appellate Court in paragraph 19 of the judgment to say that the final decree in pursuance of judgment Exhibit P4 had not been passed which is contrary to the facts as on 6.5.1996, the final decree had been passed.

On the other hand, Shri Lokesh Sinhal, learned counsel for the plaintiffs-respondents has submitted that the whole stand of the appellant was malicious and the result of mala fides as he did not want to honour the award of 1963 on the basis of which a preliminary decree had been passed by the Civil Court. The final decree had not been drawn up because of non-depositing of stamp papers of Rs.130.50 ps. Now, the final decree had been passed and in execution thereof, the appellant has taken an objection saying that the said decree cannot be executed. So, on the one hand, he is not permitting the execution of the earlier decree and when the present suit was filed, the objection taken is that the earlier decree has become final and it is for the parties to get it executed and that the subsequent suit does not lie. It was contended that it is clear from the conduct of the appellant that he is trying to defeat the rights of the plaintiffs by taking contradictory pleas before the Courts. Reliance was place on a judgment of the Supreme Court reported as AIR 1973 S.C. 1130 -Brij Kishore Prasad Singh and others Versus Jaleshwar Prasad Singh and others to say that the subsequent suit for taking "khas possession" is not barred in a suit for partition wherein compromise had been effected, but no decree had been passed. Some of the observations made by their Lordships are reproduced below:-

> "When a partition suit was compromised but no decree was drawn because of failure to produce necessary Stamp paper and the

defendants were permitted to be in possession of the property, a second suit for recovery of khas possession is not barred."

Reliance was also placed on a judgment of Patna High Court reported as AIR 1959 Patna 331 -Santan Narain Tewari Versus Saran Narain Tewari and others, wherein it was held as follows:-

"A co-sharer has got a right to seek fresh partition if for some reason the previous decree for partition becomes unenforceable so that there has not been actually breaking up of the title and possession of the co-sharer by actual delivery to each of them of the specific portion of the joint property allotted to him by that decree. This principle follows from the fundamental concept of joint ownership and possession giving each joint owner a right to transfer from this joint ownership and possession into several and independent ownership and possession, but this transformation cannot in the eye of law be held to have been brought about unless and until the entire process of transformation starting from the ascertainment of the share of each joint owner and ending in the actual delivery to him of the property given to him forming his share of the joint property, has been gone through; so long as this does not take place, the title and possession of all the co-sharers continues to be joint. It is only when the last stage has been completed that each owner ceases to be a co-sharer with the other. The matter, of course, might be different if in a particular case the facts proved show that the person seeking fresh partition is guilty of any conduct amounting to fraud on his co-sharers or on the court, preventing directly or indirectly thereby the completion of the previous partition suit by actual delivery of the

properties allotted to each co-sharer by the previous decree.

Where the parties treated the previous decree to be infructuous and continued to remain in possession as co-sharers of the properties as before, a fresh suit for partition is not barred."

It was then contended by the learned counsel for the respondents that in fact, the joint family status was never severed as was the contention made by the learned counsel for the appellant and in support of this, he placed reliance on AIR 1936 Privy Council 281 -Purnananthachi Versus T.S.Gopalaswami Odayar and others , wherein it was held as under:-

"Where an instrument of partition separating one member of a joint Hindu family, after giving him his share, provides that the remaining portion is to be divided in a particular manner among the remaining members but at the same time it is provided that the remaining members should live as one family during the lifetime of a particular senior member and that till his death the family is to be treated as an ordinary undivided Hindu family subject to the law of survivorship, a covenant of such character does not effect an immediate severance of status but postpones it to a future time. Until that time comes, there is no separation of interest among the remaining members of the family and the members hold the estate as joint tenants. There is no separation of interests in praesenti; there is only contract as to what is to be done in future and such a contract is not invalid though it may be rendered ineffective by change of circumstances. A contract of this description, which is to operate in future is, however, rare and cannot control the provision which defines shares and thereby brings about a severance of status unless it

is expressed in clear and unambiguous terms."

I have thoughtfully considered the contentions of the learned counsel for the parties and have minutely gone through the record.

After extricating the controversy from the deep morasses of the facts, it can be said the it revolves around two aspects of the matter, (i) whether the previous decree passed in civil suit no.919 of 13.12.1962, decided on 23.5.1963 had become final qua the parties, and (ii) if so, then whether the subsequent suit for partition was maintainable or was it barred by the principle of res judicata.

There is no dispute regarding the fact that civil suit no.919 of 13.12.1962 was filed in which an Arbitrator had been appointed, who had given his award which was accepted by all the parties and accordingly, a Civil Court decree had come into existence in terms of the award. However, the award of the Arbitrator was to the effect that the partition had to take place after the death of Jagni Mal and till that point of time, he would continue to be the owner in possession of all the properties. The decree, therefore, was kept in abeyance and could not be executed till the death of Jagni Mal. The final decree could not be drawn up as stamp papers of Rs.130.50 ps. were not filed by the parties. Interestingly, the appellant stands by award dated 18.5.1963 given by the Arbitrator, but is wanting the present suit to be defeated to say that the decree in pursuance of that award be got executed, rather than the filing of the present suit.

No doubt, if the law were to proceed on its own course, then the question whether the present suit was maintainable after the passing of the final decree on 6.5.1996 in the earlier proceedings, would have been debatable and questionable, but here it is apparent that the appellant is

trying to defeat the rights of the plaintiffs. There is no dispute that both the parties stand by award dated 18.5.1963 given by the Arbitrator in the earlier suit, but the appellant himself, by his conduct, had tried to defeat the award by making an attempt to alienate the property when he executed a sale deed in favour of Satish Chand and Rajiv Kumar. The factum of redemption of the mortgage is also clouded and not free from blemish. Suffice it to say that the appellant tried to wash out the effects of the earlier decree. In the execution said to have been filed by Ram Kishan, a specific objection has been taken by the appellant that it is not executable and in the present suit, an objection has been raised that the suit is barred by the principle of res judicata in view of the earlier decree.

In Santan Narain Tewari's case (supra), it was held that if a party to the partition suit is guilty of any conduct amounting to fraud which would render the previous partition ineffective and invalid, then a subsequent suit for partition would lie. So, on this count, it can safely be said that the appellant was guilty of trying to alienate the property to invalidate the earlier partition which was to take place as per the decree passed on the basis of the award of the Arbitrator and which was to be executed after the death of Jagni Mal.

Even otherwise, the observations of the Supreme Court in Brij Kishore Parsad Singh's case (supra) are also attracted to the present case and the present suit filed would only be a suit for seeking actual possession (khas possession) of the shares as determined by the Arbitrator in the previous suit and which remained unexecuted.

If one were to analyse the impact of the present case, as also the execution of the earlier decree, the result would be the same as the plaintiffs

have not claimed any thing more than what was their share in accordance with the award of the Arbitrator and the suit would be only for getting the actual possession of the property. In view of these peculiar facts of this case, it would only be in the fitness of things if the judgment of the lower Appellate Court is maintained.

Technicalities of law cannot be permitted to defeat the substantial rights of the parties. The endeavour of the Courts is always to do substantial justice. In the instant case, the parties have been litigating since 1962 regarding the assets of Jagni Mal. The award itself was given in the year 1963. The parties have been deprived of the fruits of the earlier decree for the last about three decades. This decree was sought to be rendered inexecutable by the appellant himself. Once the conduct of the appellant is held to be such, then the present suit for partition to seek actual possession of their shares by the plaintiffs would not be barred and hit by the principle of res judicata. I do not, therefore, agree with the contention raised by the learned counsel for the appellant that the present suit is barred by the principle of res judicata.

For the foregoing reasons, the present appeal is devoid of any merit and is dismissed as such.

September 01,2006 (Mahesh Grover)
"SCM" Judge